

(A) are easier to manage individually than would be one comprehensive acquisition;

(B) address complex information technology objectives incrementally in order to enhance the likelihood of achieving workable solutions for attainment of those objectives;

(C) provide for delivery, implementation, and testing of workable systems or solutions in discrete increments each of which comprises a system or solution that is not dependent on any subsequent increment in order to perform its principal functions; and

(D) provide an opportunity for subsequent increments of the acquisition to take advantage of any evolution in technology or needs that occur during conduct of the earlier increments;

(2) a contract for an increment of an information technology acquisition should, to the maximum extent practicable, be awarded within 180 days after the date on which the solicitation is issued and, if the contract for that increment cannot be awarded within such period, the increment should be considered for cancellation; and

(3) the information technology provided for in a contract for acquisition of information technology should be delivered within 18 months after the date on which the solicitation resulting in award of the contract was issued.

(Pub. L. 93-400, § 38, formerly § 35, as added Pub. L. 104-106, div. E, title LII, § 5202(a), Feb. 10, 1996, 110 Stat. 690; renumbered § 38, Pub. L. 104-201, div. A, title X, § 1074(d)(1), Sept. 23, 1996, 110 Stat. 2660.)

#### EFFECTIVE DATE

Section effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104-106, Feb. 10, 1996, 110 Stat. 702.

### § 435. Levels of compensation of certain contractor personnel not allowable as costs under certain contracts

#### (a) Determination required

For purposes of section 2324(e)(1)(P) of title 10 and section 256(e)(1)(P) of this title, the Administrator shall review commercially available surveys of executive compensation and, on the basis of the results of the review, determine a benchmark compensation amount to apply for each fiscal year. In making determinations under this subsection the Administrator shall consult with the Director of the Defense Contract Audit Agency and such other officials of executive agencies as the Administrator considers appropriate.

#### (b) Benchmark compensation amount

The benchmark compensation amount applicable for a fiscal year is the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available at the time the determination under subsection (a) of this section is made.

#### (c) Definitions

In this section:

(1) The term “compensation”, for a fiscal year, means the total amount of wages, salary, bonuses and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer’s cost accounting records for the fiscal year.

(2) The term “senior executives”, with respect to a contractor, means the five most highly compensated employees in management positions at each home office and each segment of the contractor.

(3) The term “benchmark corporation”, with respect to a fiscal year, means a publicly-owned United States corporation that has annual sales in excess of \$50,000,000 for the fiscal year.

(4) The term “publicly-owned United States corporation” means a corporation organized under the laws of a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States the voting stock of which is publicly traded.

(5) The term “fiscal year” means a fiscal year established by a contractor for accounting purposes.

(Pub. L. 93-400, § 39, as added Pub. L. 105-85, div. A, title VIII, § 808(c)(1), Nov. 18, 1997, 111 Stat. 1837; amended Pub. L. 105-261, div. A, title VIII, § 804(c)(1), Oct. 17, 1998, 112 Stat. 2083.)

#### CODIFICATION

Another section 39 of Pub. L. 93-400 was renumbered section 40 and is classified to section 436 of this title.

#### AMENDMENTS

1998—Subsec. (c)(2). Pub. L. 105-261 amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The term ‘senior executive’, with respect to a corporation, means—

“(A) the chief executive officer of the corporation or any individual acting in a similar capacity for the corporation;

“(B) the four most highly compensated employees in management positions of the corporation other than the chief executive officer; and

“(C) in the case of a corporation that has components which report directly to the corporate headquarters, the five most highly compensated individuals in management positions at each such component.”

#### EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-261 applicable with respect to costs of compensation of senior executives incurred after Jan. 1, 1999, under covered contracts entered into before, on, or after Oct. 17, 1998, see section 804(d) of Pub. L. 105-261, set out as a note under section 2324 of Title 10, Armed Forces.

#### EFFECTIVE DATE

Section 808(e) of Pub. L. 105-85 provided that: “The amendments made by this section [enacting this section and amending section 256 of this title and section 2324 of Title 10, Armed Forces] shall—

“(1) take effect on the date that is 90 days after the date of the enactment of this Act [Nov. 18, 1997]; and

“(2) apply with respect to costs of compensation incurred after January 1, 1998, under covered contracts entered into before, on, or after the date of the enactment of this Act.”

#### REGULATIONS

Section 808(d) of Pub. L. 105-85 provided that: “Regulations implementing the amendments made by this

section [see Effective Date note set out above] shall be published in the Federal Register not later than the effective date of the amendments under subsection (e) [see Effective Date note set out above].”

**EXCLUSIVE APPLICABILITY OF PROVISIONS LIMITING ALLOWABILITY OF COMPENSATION FOR CERTAIN CONTRACTOR PERSONNEL**

Section 808(f) of Pub. L. 105-85 provided that: “Notwithstanding any other provision of law, no other limitation in law on the allowability of costs of compensation of senior executives under covered contracts shall apply to such costs of compensation incurred after January 1, 1998.”

**DEFINITIONS FOR PURPOSES OF SECTION 808 OF  
PUB. L. 105-85**

Section 808(g) of Pub. L. 105-85, as amended by Pub. L. 105-261, div. A, title VIII, §804(c)(2), Oct. 17, 1998, 112 Stat. 2083, provided that: “In this section [enacting this section, amending section 256 of this title and section 2324 of Title 10, Armed Forces, and enacting provisions set out as notes under this section]:

“(1) The term ‘covered contract’ has the meaning given such term in section 2324(l) of title 10, United States Code, and section 306(l) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256(l)).

“(2) The terms ‘compensation’ and ‘senior executives’ have the meanings given such terms in section 2324(l) of title 10, United States Code, and section 306(m) of the Federal Property and Administrative Services Act of 1949.”

**§ 436. Protection of constitutional rights of contractors**

**(a) Prohibition**

A contractor may not be required, as a condition for entering into a contract with the Federal Government, to waive any right under the Constitution for any purpose related to Chemical Weapons Convention Implementation Act of 1997 [22 U.S.C. 6701 et seq.] or the Chemical Weapons Convention (as defined in section 3 of such Act [22 U.S.C. 6701]).

**(b) Construction**

Nothing in subsection (a) of this section shall be construed to prohibit an executive agency from including in a contract a clause that requires the contractor to permit inspections for the purpose of ensuring that the contractor is performing the contract in accordance with the provisions of the contract.

(Pub. L. 93-400, §40, formerly §39, as added Pub. L. 105-277, div. I, title III, §308(a), Oct. 21, 1998, 112 Stat. 2681-879; renumbered §40, Pub. L. 108-136, div. A, title XIV, §1431(d)(2), Nov. 24, 2003, 117 Stat. 1672.)

**REFERENCES IN TEXT**

The Chemical Weapons Convention Implementation Act of 1997, referred to in subsec. (a), probably means the Chemical Weapons Convention Implementation Act of 1998, which is div. I of Pub. L. 105-277, Oct. 21, 1998, 112 Stat. 2681-856, and is classified principally to chapter 75 (§6701 et seq.) of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 6701 of Title 22 and Tables.

**§ 437. Incentives for efficient performance of services contracts**

**(a) Incentive for use of performance-based services contracts**

A performance-based contract for the procurement of services entered into by an executive agency or a performance-based task order for services issued by an executive agency may be treated as a contract for the procurement of commercial items if—

(1) the value of the contract or task order is estimated not to exceed \$25,000,000;

(2) the contract or task order sets forth specifically each task to be performed and, for each task—

(A) defines the task in measurable, mission-related terms;

(B) identifies the specific end products or output to be achieved; and

(C) contains firm, fixed prices for specific tasks to be performed or outcomes to be achieved; and

(3) the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Federal Government.

**(b) Regulations**

The regulations implementing this section shall require agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using the authority of this section. The data may be collected using the Federal Procurement Data System or other reporting mechanism.

**(c) Report**

Not later than two years after November 24, 2003, the Director of the Office of Management and Budget shall prepare and submit to the Committees on Governmental Affairs and on Armed Services of the Senate and the Committees on Government Reform and on Armed Services of the House of Representatives a report on the contracts or task orders treated as contracts for commercial items using the authority of this section. The report shall include data on the use of such authority both government-wide and for each department and agency.

**(d) Expiration**

The authority under this section shall expire 10 years after November 24, 2003.

(Pub. L. 93-400, §41, as added Pub. L. 108-136, div. A, title XIV, §1431(a), Nov. 24, 2003, 117 Stat. 1671.)

**§ 438. Civilian Board of Contract Appeals**

**(a) Board established**

There is established in the General Services Administration a board of contract appeals to be known as the Civilian Board of Contract Appeals (in this section referred to as the “Civilian Board”).

**(b) Membership**

**(1) Appointment**

(A) The Civilian Board shall consist of members appointed by the Administrator of Gen-